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Reports of Malaysian and Singapore Cases

DETERMINED BY

THE HIGH COURTS

AND BY

THE FEDERAL COURT

AND THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

TAN CHYE CHOO & ORS. v. CHONG KEW MOI

[P.C. (Lord Morris of Borth-y-Gest, Lord Wilberforce & Sir Charles Russell) November 6, 1969]

[Privy Council Appeal No. 25 of 1966]

Negligence — Highway — Accident attributable to latent defect in motor vehicle — No evidence of negligence in maintenance of vehicle — Statutory duty — Breach of — Whether there is right of action in person injured by breach.

Damages — Injury sustained by reason of breach of statutory duty — Damages cannot be awarded.

This was an appeal against the decision of the Federal Court ([1966] 2 M.L.J. 4) which dismissed an appeal from the High Court ([1965] 2 M.L.J. 198) giving judgment for the respondent in a claim brought by the appellants for damages arising out of a road accident. The facts showed that the collision happened because the taxi belonging to the respondent which was involved in the accident veered across the road as a result of a fracture occurring in the connection between the steering mechanism and the nearside front wheel. The fracture caused a complete failure of the steering and braking systems with the result that the taxi became out of control. The appellants claimed damages for (a) negligence (b) breach of statutory duty.

Held, dismissing the appeal: (1) on the facts the collision happened because of a latent defect in the taxi of which the respondent without any negligence on her part (or on the part of anyone for whom she was responsible) was unaware and there was no evidence that the respondent or her servant or agent had been guilty of negligence in relation to the maintenance of the taxi;

(2) any breach of the Motor Vehicles (Construction and Use) Rules, 1959 did not give the appellants a cause of action against the respondent.

Cases referred to:—

(1) *Cutler* v. *Wandsworth Stadium Ltd.* [1949] A.C. 398.

(2) *Groves* v. *Wimborne (Lord)* [1898] 2 Q.B. 402.

(3) *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.* [1923] 2 K.B. 832.

(4) *Monk* v. *Warbey* [1935] 1 K.B. 75.

(5) *London Passenger Transport Board* v. *Upson* [1949] A.C. 155.

(6) *Ng Siew Eng & Anor.* v. *Loh Tuan Woon* [1955] M.L.J. 89.

PRIVY COUNCIL Appeal from Malaysia heard on June 23, 24 and 26, 1969.

Ian Baillieu and *Denis Murphy* for the appellants.

D.P. Croom-Johnson Q.C. and *Charles Whitby* for the respondents.

Lord Morris of Borth-y-Gest (delivering the judgment of the Board): On 28th January 1962 a collision occurred between two motor cars which were being driven in opposite directions along the Johore Bahru-Scudai Road. One of the cars (a Chevrolet car) was a taxi which belonged to the respondent. It was being driven by her servant or agent. The driver of the other car was killed as also was a passenger in the car: another passenger was injured. Three separate actions claiming damages were brought in the High Court against the respondent. The three actions were later consolidated. The appellants failed in their claims and judgment was given on 16th June 1965 in favour of the respondent. There was an appeal to the Federal Court of Malaysia and judgment dismissing the appeal was given on 13th February 1966. From that judgment appeal is now brought.

One of the circumstances of the occurrence that was established and was accepted by the learned judge was that the taxi went over to its wrong side of the road. As a result and as a consequence the collision occurred. No fault lay with the driver of the other car. Unless an acceptable explanation was forthcoming it would seem to follow that the claims should succeed. It was however established that the reason why the taxi veered across the road was that a fracture occurred of the connection between the steering mechanism and the nearside front wheel. The fracture, occurring as the taxi was

being driven along the road, caused a complete failure of the steering and braking systems with the result that the taxi became out of control. On the basis of that finding questions arose as to whether the respondent had been negligent in using or permitting or causing the taxi to be used on the road in a condition which either was known or ought to have been known by her or her servant or agent to be a danger or likely to cause danger to persons on the road. In this connection further findings of fact become of relevance. The respondent did not have personal knowledge of the mechanism of the taxi. It had been first registered (as a private car) on 21st February 1959. She had bought it (in November 1960) as an investment. It was to be looked after by her servant or agent — the driver. It had originally had a petrol engine but shortly before the respondent bought it the petrol engine had been replaced by a diesel engine. The learned judge stated in his judgment that the change to a diesel engine was approved by the Registrar and Inspector of Motor Vehicles, Johore. A diesel engine is heavier than a petrol engine. The extra weight would be too heavy for the front suspension coil springs. What had been done after the diesel engine was installed was explained by a witness who was an experienced motor engineer and whose evidence was accepted by the learned judge. That witness took the relevant assembly to pieces. He found that in order to increase the height of the spring the original spring had been lengthened by inserting a steel ring (which was called a shim) between the lower end of the spring and its seating. The shim was of smaller diameter than the spring: after its insertion the spring would no longer be securely anchored: previously it would have been. As a result there were greater loads on the top ball joints than they were intended to take. In consequence the near-side top ball joint failed and that allowed the near-side front stub axle, complete with hub and wheel, to fall away from its anchorage: that caused the severing of the brake pipe. When that happened the driver would find himself completely out of control through the loss of his steering and through having no brakes.

Though it was established and was held that the accident was caused by this sudden failure, thus described, the evidence showed that the taxi had been run for some 14 months after the diesel engine had been installed, that in that period the taxi had covered about 60,000 miles and that no cause had been given to suspect that the taxi was not in satisfactory condition. As a consequence of the way in which the spring had been lengthened there would be a certain amount of movement between the spring and its seating. But for the insertion of the shim there would not have been such movement. After a long period of driving that movement caused the fractures which resulted in the loss of braking and steering. The position was thus expressed by the learned judge when in his judgment he summarised the conclusion reached by the witness whose evidence he accepted:—

> "The use of this round shim had caused the entire stability of the front suspension to be greatly impaired because the front springs were no longer located in the bottom wishbone and were in fact lying loosely upon the single shim that had been incorrectly fixed. The result of this was to cause far greater loads on the top ball joints than they were intended to take, and in consequence the near-side top bolt [sic] joint completely failed and this allowed the near-side front stub axle complete with hub and wheel to fall away from its anchorage. When the wheel fell away from its anchorage the flexible fluid pipe of the braking system got severed. With the severing of a brake pipe all braking is completely lost on all wheels. When this happened, the driver would not only find himself completely out of control through the loss of his steering but also his predicament would be worsened by having no brakes whatsoever."

The witness was of the opinion that it had been entirely wrong to put in a shim and that the correction of height should have been achieved by replacement of springs.

A further relevant fact was that the taxi (which was a public service vehicle) was examined and reported upon by the Registrar of Motor Vehicles, Johore Bahru. The examination was on 1st October 1961. The report was dated 4th October 1961. That was a date less than four months before the accident. By reference to each one of 19 headings (including headings relating to the springs, chassis frame, brake efficiency and steering effect) the report was satisfactory. The view of the witness above referred to was that the examination had not been thorough but had been of a cursory nature: if it had been thorough the defects would have been detected.

One of the allegations in the pleadings was that the accident had happened because the driver of the taxi had negligently driven on to the wrong side of the road. At the trial however it was conceded that the taxi went on to the wrong side of the road as the result of a mechanical defect in the taxi. Negligent driving as such was not pressed. As a consequence one of the chief issues under investigation was the issue whether there had been a failure properly to maintain the taxi. Had the driver had some warning — which he wrongly failed to heed — that the taxi was not in a satisfactory condition? Had there been a failure properly to maintain and inspect? As to the former of these questions the evidence of the driver who had been driving the taxi for about seven or eight months before the accident was to the effect that the taxi had been running well and

running normally and that he had not known or noticed that there was anything wrong with it: the taxi had not wobbled or proceeded unsteadily: no defect in the steering had manifested itself. Though as to one point the learned judge had firmly rejected the driver's evidence their Lordships do not read the judgment as being other than an acceptance of the driver's evidence in regard to the above-mentioned matters. The more important issue related to inspection and maintenance. The driver gave evidence of the servicing of the taxi. The automobile engineer, whose evidence was acceptable to the learned judge, considered that all vehicles should be examined every six months and inspected at frequent periods. The judgment of the learned judge proceeded on the basis that there had been no failure to take proper steps to service and maintain the car. He held that the respondent "had done all that she could be expected to do." The learned judge had had shown to him the various relevant mechanical parts and he held that she had not been negligent "merely because she used the taxi cab which had a mechanical defect which was not apparent to the ordinary person." He further pointed out that the respondent had (less than four months before the accident) had the taxi examined by the Registrar of Motor Vehicles and had received a report that the taxi was in a satisfactory condition.

On those findings their Lordships see no reason to differ from the conclusion that the tragic and lamentable collision happened because there was a latent defect in the taxi of which the respondent without any negligence on her part (or on the part of anyone for whom she was responsible) was unaware.

The conclusion of the majority in the Federal Court of Malaysia was to the same effect. The learned Lord President held that the accident came about because there was a rupture in the steering system of the taxi immediately before the taxi, out of control, began to move to its off side. The judgment of the Lord President (with which Ismail Khan J. concurred) proceeded upon an acceptance of the evidence of the taxi driver in regard to maintenance and inspection.

> "His evidence, however, was that the vehicle was regularly serviced and lubricated and that at least once it was sent to the Road Transport Department for inspection. Moreover, the mechanical fault that led to the accident was not one that any ordinary system of inspection would have revealed. It was not something that a normal careful driver or mechanic would have noticed, as for instance a damaged tyre. It was in such a position that it could only have been discovered by taking most of the springing and steering assembly to pieces. And it is difficult to think that even the most prudent person would take such a step without at least some warning that there might be something wrong that such a step would discover. And there was no evidence that there was any such warning. The vehicle had been bought by the defendant after the diesel engine had been installed and she could not have known of the defect that had been created by the incapacity or carelessness of (to her) the anonymous mechanic who had done the work. Moreover, this type of conversion is of common occurrence and there is nothing to show that it is often done in such a way as ultimately to lead to disaster as it did in this case."

In their Lordships' view it was a proper conclusion from the evidence that neither the respondent nor her servant or agent had been guilty of negligence in relation to the maintenance of the taxi.

Liability was also asserted on the ground of a breach of statutory duty. The Road Traffic Ordinance 1958 (No. 49 of 1958) is an Ordinance to make provision for the regulation of motor vehicles and of traffic on roads and otherwise with respect to roads and vehicles thereon, and to make provision for the protection of third parties against risks arising out of the use of motor vehicles and to provide for the co-ordination and control of means of and facilities for transport. Rule-making powers are conferred by various sections and in terms set out in section 146 there are provisions for certain penalties including penalties if any person without lawful excuse (proof of which was to lie on him) acts in contravention or fails to comply with any provision of the Ordinance or any rules made thereunder. In exercise of the powers conferred by sections 57, 73 and 135 of the Ordinance, the Minister made certain rules (Motor Vehicles (Construction and Use) Rules 1959) which came into force on 1st July 1959. The Rules are comprehensive and deal with a variety of matters: they are under such headings as "Construction", "Public Service Vehicles Construction", "Public Service Vehicles Equipment", "Use of All Motor Vehicles on Roads" (which includes Rules 93 and 94) and "Use of Public Service Vehicles". In the terms of rule 138 there is a general provision to the effect that no person shall use cause suffer or permit any vehicle to be used in a condition or in a manner that contravenes or fails to comply with any of the rules applying to construction, equipment, type of use, or manner of use of the vehicle.

Rules 93 and 94 are in the following terms:—

> "93. No motor vehicle shall be used on a road for any purpose for which its type or construction is so unsuitable as to cause or be likely to cause danger to any person on the vehicle or on a road.
>
> 94. The condition of any motor vehicle used on a road and all its parts and accessories, shall at all times be such that no danger is caused or likely to be caused to any person on the vehicle or on a road."

It was contended (by particular reference to rule 94) that the taxi was not in fact in such a condition that no danger was caused or likely to be caused to any person on a road and that liability for damages for breach of statutory

duty should result. It was held both by the learned judge and by the Federal Court that a breach of the Motor Vehicles (Construction and Use) Rules 1959 did not give the plaintiffs a cause of action against the defendants.

Guidance as to the principles to be applied in considering whether there is a right of action in a person who claims that he has been injured by reason of a breach of statutory duty is to be found in the speeches in *Cutler v. Wandsworth Stadium Ltd.*[1] Lord Simonds in his speech at p. 407 said:—

"The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted. But that there are indications which point with more or less force to the one answer or the other is clear from authorities which, even where they do not bind, will have great weight with the House. For instance, if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration. But 'where an Act' (I cite now from the judgment of Lord Tenterden C.J. in *Doe v. Bridges*) 'creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.' This passage was cited with approval by the Earl of Halsbury L.C. in *Pasmore v. Oswaldtwistle Urban District Council.* But this general rule is subject to exceptions. It may be that, though a specific remedy is provided by the Act, yet the person injured has a personal right of action in addition. I cannot state that proposition more happily, or indeed more favourably to the appellant, than in the words of Lord Kinnear in *Black v. Fife Coal Co. Ltd.*: 'If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by Lord Cairns in *Atkinson v. Newcastle Waterworks Co.* and by Lord Herschell in *Cowley v. Newmarket Local Board* solves the question. We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention.' An earlier and a later example of the application of this principle will be found in *Groves v. Wimborne (Lord)* and *Monk v. Warbey*, in the former of which cases the Act in question was described by A. L. Smith L.J. as 'a public Act passed in favour of the workers in factories and workshops to compel their employers to do certain things for their protection and benefit.'"

Lord du Parcq in his speech pointed out that in the preceding quarter of a century in cases where it was being considered whether there was a right of action resulting from a breach of statutory duty "the debate has normally turned on the question whether the case before the court falls within the decision in *Groves* v. *Wimborne (Lord)*[2] or that in *Phillips* v. *Britannia Hygienic Co. Ltd.*"[3] Lord Normand in his speech (see p. 413) also stated the general principle with great clarity. To the same effect had been the approach of Greer L.J. and of Maugham L.J. in their judgments in *Monk* v. *Warbey*[4] In those judgments approval was given of the principle stated by Atkin L.J. in *Phillips* case.

In *Phillips* case a regulation contained in the Motor Cars (Use and Construction) Order 1904 made under powers given by the Locomotives on Highways Act 1896 provided that "The motor car and all the fittings thereof shall be in such a condition as not to cause or to be likely to cause, danger to any person on the motor car or on any highway." Through no fault of its owners a vehicle was in such a condition as to cause danger to persons on it or on the highway. Though it had some seven weeks earlier been sent for overhaul and repair one of its axles was in fact defective. The axle broke and a wheel came off and damaged another vehicle. A claim by the owner of the damaged vehicle having succeeded in the County Court, the basis of the decision being a breach of statutory duty, it was held in the Divisional Court and in the Court of Appeal that no right of action lay. In his judgment Atkin L.J. expressed the conclusion that the duty which the various regulations imposed was not a duty enforceable by individuals injured but a public duty only. He added:—

"It is not likely that the Legislature in empowering a department to make regulations for the use and construction of motor cars, permitted the department to impose new duties in favour of individuals and new causes of action for breach of them in addition to the obligations already well provided for and regulated by the common law of those who bring vehicles upon highways. In particular it is not likely that the Legislature intended by these means to impose on the owners of vehicles an absolute obligation to have them roadworthy in all events even in the absence of negligence."

In their Lordships' view it is not possible to differentiate the contention raised in the present case from that which was rejected in *Phillips'* case. Nor has a consideration of the decisions in pedestrian crossing cases including that in *London Passenger Transport Board v. Upson*[5] led their Lordships to any different conclusion.

Reliance was placed upon observations made in the case of *Ng Siew Eng & Anor. v. Loh Tuan Woon.*[6] While it may well be that statutory obligations will often indicate a standard of care which must be reached so that a failure to reach it will be evidence of negligence their Lordships must not be taken to accept that a mere breach of the regulation in question in that case would by itself and in the absence of negligence give rise to a cause of action.

It was contended that members of the public should never be at risk of suffering injury without having compensation even in cases where no fault can be found: further it was contended that, in contrast to earlier days, there are now obligations compulsorily to insure. But apart from the circumstance that there are limitations in regard to the obligation to insure these are considerations of policy for a legislature. The decision in *Phillips'* case has at all times been judicially accepted without any adverse comment. In his speech in *Cutler's* case Lord Simonds linked the decisions in *Groves v. Wimborne* and *Monk v. Warbey:* Lord du Pacq as already pointed out showed that questions often arose as to whether a case fell within *Groves v. Wimborne* or within *Phillips v. Britannia Hygienic Laundry Co. Ltd.* The law as laid down in *Phillips'* case was well known and well established when the regulations now being considered were made. The decision was a part of what Lord Simonds in his speech in *Cutler's* case referred to as "the pre-existing law". There are no indications that any new legislative provision was at any time designed to effect any change in the law.

For these reasons their Lordships will report to the Head of Malaysia their opinion that the appeal fails and ought to be dismissed with costs.

Appeal dismissed.

Solicitor: *Lipton & Jeceries; Berrymans.*

KHOO TAM SENG v. PUBLIC PROSECUTOR

[A.Cr.J. (Abdul Aziz J.) June 10, 1969]

[K.L. — Criminal Appeal No. 9 of 1969]

Criminal Law and Procedure — Sentence — Forfeiture — Whether mandatory under the Excise Enactment (Cap. 133) — Order of forfeiture in addition to fine held excessive.

Excise Enactment (Cap. 133) ss. 43(i), 61 & 67.

The appellant in this case was charged under the Excise Enactment for having in possession 8.5 gallons of fermented toddy in a lorry. The accused pleaded guilty. The trial magistrate imposed a sentence of $200 or 1 month imprisonment. He also made an order of forfeiture of the lorry in which the toddy was conveyed on the ground that the order of forfeiture was mandatory.

The accused appealed against the order of forfeiture.

Held: allowing the appeal, (1) under the Excise Enactment an order of forfeiture was not mandatory but merely discretionary;

(2) having regard to the quantity of the toddy conveyed and the fine imposed by the magistrate the order of forfeiture of the lorry or part of the sentence was manifestly excessive and must be quashed.

MAGISTRATE'S CRIMINAL APPEAL.

Syed Hassan Aljeffri for the appellant.

Ahmad bin Abdul (Deputy Public Prosecutor) for the respondent.

Abdul Aziz J. (delivering oral judgment): This is an appeal against the decision of an order of forfeiture of motor vehicle No. BG 2947 made by the Telok Datok magistrate in respect of a criminal charge under the Excise Enactment. The charge reads:—

"That you, Khoo Tam Seng, at about 12.15 p.m. on 20.11.68 at 13th milestone, Klang-Banting Road, in the State of Selangor, not being a person authorised under section 43(i) of the Excise Enactment, Cap. 133 did have in your possession fermented toddy to wit one glass bell jar, one plastic jerry can and one aluminium kettle containing 8.5 gallons of toddy and you have thereby committed an offence under section 43(i) and punishable under section 67 of the Excise Enactment, Cap. 133."

To this charge, the accused pleaded guilty; and on his own plea of guilty, he was fined $200 or 1 month's imprisonment and the lorry, which was used to carry the 8.5 gallons of toddy, was ordered to be confiscated.

It seems to me that the learned magistrate had misinterpreted sections 61(i) and 67 of the Excise Enactment (Cap. 133) when he said that the order of forfeiture was mandatory. Section 61(i) reads:—

"All goods or articles in respect of which there may have been, ... committed any offence against this or any other written law relating to the Excise ..... together with any still, utensil ..... receptacle ..... or *conveyance* in which the same may have been found ..... may be seized, and all such goods and other articles so seized shall if an offence has been committed, be liable to forfeiture ....."

Section 67 reads:—

"..... every act done ..... contrary to, the provisions of this Enactment ..... shall be deemed to be an offence against this Enactment, and for every such offence ..... shall, in addition to the forfeiture of any articles seized, be liable ..... to a fine of five hundred dollars ....."

It is clear from the above that these sections, if properly analysed and interpreted, do not make an order of forfeitue mandatory but merely discretionary.

Having regard to the quantity of the toddy conveyed and the fine imposed by the magistrate, the order of forfeiture as part of the sentence was manifestly excessive. Consequently, the appeal would be allowed to the extent that the order of forfeiture be quashed.

Appeal allowed.

Solicitors: *Aljeffri & Co.*